84-498



No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA — PETITIONER

VS.

NATIONAL BANK OF COMMERCE — RESPONDENT

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED IN DETERMINING THAT THE PETITIONER HAD FAILED TO ESTABLISH THAT RESPONDENT WAS IN POSSESSION OF "PROPERTY OR RIGHTS TO PROPERTY" BELONGING TO THE DELINQUENT TAX DEBTOR.

## OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISIONS INVOLVED

The Petition of the United States of America sets out the opinions below, the jurisdiction of this Court and the statutes involved (Petition pages 1 and 2, and Appendix to Petition pages 1a-38a). References to the opinions below will be directed to the Appendix to the Petition and will be cited as "App. pp. __". References to the Petition will be cited as "Pet. pp. ___".

## COUNTER-STATEMENT OF THE CASE

A concise statement of the facts of the case and its procedural history appears in the opinions of the Courts below (App. pp. 1a-29a).

Petitioner accurately states (Pet. p. 4) ". . . the court concluded that the government had not shown the bank to be in possession of 'property [or] rights to property * * * belonging to 'Roy, as Section 6331(a) requires." However, Petitioner next states "[T]he court also found some force in the argument that 'the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy'". (Pet. p. 4). In fact, the Eighth Circuit stated only that "[I]t might be argued that the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy." (App. p. 7a). The Eighth Circuit then specifically found that the Arkansas Supreme Court had "rejected the view that a creditor of one co-owner is subrogated to that co-owner's



power to withdraw the entire account." (App. p. 7a).

Petitioner also states that the Court of Appeals concluded that the government could not prevail without negating or quantifying the claims that Ruby or Neva might have to the bank accounts in question. On the contrary, the Eighth Circuit simply found that the government bears the burden of establishing that the Respondent is in possession "property or rights to property" belonging to the tax debtor and failed to do so.

Finally, the Petitioner states that the Eighth Circuit appeared to agree with its contention that "a number of cases - probably the majority - either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a

Section 6331 levy." (Pet. p. 5). On the contrary, the Eighth Circuit specifically disagreed with the Petitioner's contention:

> "The government also contends that a number of cases - probably the majority - either or expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy. There are unquestionably such cases. We choose to follow Stock Yards Bank instead. (App. p. 11a).

The Eighth Circuit very thoroughly analyzed virtually all of the authority which Petitioner presents in its Petition and determined that only by following United States vs. Stock Yards Bank of Louisville, 231 F.2d 628 (6th Circuit, 1956) could it avoid direct conflict with the 6th Circuit and yet not be in conflict with any other Circuit.



## REASONS FOR DENYING THE PETITION

### I.

### THERE IS NO DIVISION OF AUTHORITY AMONG THE COURTS OF APPEALS WITH RESPECT TO THE ISSUE DECIDED BELOW.

The Eighth Circuit very carefully considered whether its decision might be in conflict with the decisions of this Court or the other Circuits. (See, App. pp. 11a-17a). The Eighth Circuit considered a possible conflict or accord of its decision with the Fifth Circuit decisions, United Sand & Gravel Contractors, Inc. vs. United States, 624 F.2d 733 (Fifth Circuit, 1980) and United States vs. Citizens and Southern National Bank, 538 F.2d 1101 (Fifth Circuit, 1976), the Sixth Circuit decision, United States vs. Stock Yards Bank of Louisville, 231 F.2d 628 (Sixth Circuit, 1956), the Tenth Circuit decision, Dieckmann vs. United States, 550 F.2d 622 (Tenth Cir-

cuit, 1977), and this Court's decision, United States vs. Rodgers, 103 S.Ct. 2132 (1983). The Eighth Circuit very clearly distinguished this case from the decisions of the Fifth and Tenth Circuits and determined that its decision would not be in conflict with those. The Court noted that, apparently, neither the Fifth nor Tenth Circuit considered Stock Yards Bank in their cases, but that none of their decisions conflict with it. (See, App. p. 13a)

In its analysis, the Eighth Circuit determined that its decision would be in complete accord with the decision of the Sixth Circuit in Stock Yards Bank and determined that it could not hold for the government without creating a direct conflict with the Sixth Circuit. In Stock Yards Bank, the Sixth Circuit had determined that the government has the burden of establishing the



extent, if any, of the taxpayer's property interest in property sought to be levied upon. Stock Yards Bank involved a levy on a bank having in its possession U. S. Savings Bonds held in joint names. The Sixth Circuit determined that even though the bond was held in joint names and either of the co-owners could present the bond for redemption, receive payment in full and thereby eliminate the other co-owner's interest in the bond, no definition of the tax debtor's property interest, if any, had been proven. Presentation by the government of proof of the tax debtor's property interest was found by the Sixth Circuit to be essential to its use of the levy procedure. The Eighth Circuit correctly determined that the same rule should be applied to the jointly held bank account in this case. As the Eighth Circuit noted, under Arkansas law, the property interest of a co-depositor in a jointly held bank account is not determined

by the facts that the account is held in joint names, either depositor may receive the entire proceeds of the account in full upon demand, and the co-depositor would have no right of action against the bank for honoring demand. See, Black vs. Black, 199 Ark. 609, 135 S.W.2d 837 (1940), and McGuire vs. Benton State Bank, 232 Ark. 1008, 342 S.W.2d 77 (1961). Thus, the Eighth Circuit's decision and that of the Sixth Circuit are indistinguishable. In both, the IRS was seeking to levy on jointly held property where no property interest or right to property of the tax debtor had been established under the applicable law. In both, the mere fact that the property was held in joint names did not legally bestow upon the tax debtor any right to property. The Eighth and Sixth Circuits are therefore in agreement, and their decisions do not conflict with the decisions of any other



Circuit.

The Eighth Circuit also correctly found support for this decision in the dictum of this Court in United States vs. Rodgers, 103 S.Ct. 2132 (1983), where this Court said:

> "Section 6331, unlike Section 7403 does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by Section 6331. Indeed, third parties whose property or interest in property have been seized inadvertently are entitled to claim that property has been 'wrongfully levied upon', and may apply for its return either through administrative channels, 26 U.S.C. §6343(b), or through a civil action filed in a federal district court, Section 7426(a) (1); see, Section 7426(b)(1), 7426(b) (2)(A).

Petitioner sets out numerous cases in its Petition which it asserts conflict with the decision below. In some of them was the issue simply whether the tax

debtor owned an interest in the property being levied upon. For the most part, the cases concerned whether a bank's right of set-off is paramount to an IRS levy and did not question the tax debtor's interest in the account. None seem to involve a question of whose money was in the account being levied upon and, in fact, most of the cases do not even involve joint bank accounts. Further, none concern Arkansas law which is determinative of the tax debtor's property interest in this case.

II.

THE COURT BELOW CORRECTLY DETERMINED THAT PETITIONER HAD FAILED TO ESTABLISH, UNDER ARKANSAS LAW, THAT THE JOINT BANK ACCOUNTS WERE PROPERTY OR RIGHTS TO PROPERTY BELONGING TO THE TAX DEBTOR.

Despite the myriad of other arguments made by the Petitioner, this case is determined simply by considering whether the



Petitioner has proven Respondent to be in possession of property or rights to property belonging to the tax debtor.

Petitioner agrees that State law controls in determining the nature of the legal interest the taxpayer has in property. (Pet. p. 9). In fact, it is without dispute that this is correct. See, Aquilino vs. United States, 363 U.S. 509 (1960). There is also no doubt that the IRS can lawfully levy only on property or rights to property belonging to the tax debtor. See, 26 U.S.C. §§6321 and 6331(a). Before a third party can be liable to the IRS for refusing to honor an IRS levy, it must be in possession of property or rights to property belonging to the tax debtor. See, 26 U.S.C. §6332(a). Therefore, before Petitioner can prevail against Respondent for its refusal to honor the levy, Petitioner must prove Respondent

was in possession of property or rights to property belonging to the tax debtor. Petitioner has simply failed to provide such proof and therefore cannot prevail in this action.

Petitioner contends that because Respondent holds two bank accounts in the joint names of the tax debtor and two other persons, that it holds property or rights to property belonging to the tax debtor. This is simply not the case under Arkansas law.

Petitioner correctly argues that "[U]nder Arkansas banking law, Roy possessed the unqualified right to withdraw the full amount on deposit in the joint checking and savings accounts, without notice to his co-depositors, for his own exclusive benefit. The bank for its part was obligated to honor any withdrawal requests Roy might make, again up to the full value of the accounts."



Pet. pp. 9-10). However, Roy would have these rights only under Arkansas banking law, and not under Arkansas property law. As Petitioner notes on page 10 of its Petition, the relevant Arkansas statutes are Ark. Stat. Ann. §67-521 (1980) and Ark. Stat. Ann. §67-552 (1980), amended by Act No. 843 of 1983, Section 1. Those statutes set out the rules for banks to follow in dealing with accounts held in joint names, but were passed for the protection of the bank and not for determining property rights. As the Eighth Circuit noted in its opinion (App. p. 6a):

> "Black vs. Black, 199 Ark. 609, 135 S.W.2d 837 (1940), holds that the statute was
>
> > passed for the protection of the bank in which the deposit was made. . . .The statute effects no investiture of title as between the depositors themselves, but only relieves the

> bank of the responsibility and duty of making inquiry as to the respective interests of the depositors in the deposit until one of the joint tenants shall give notice in writing that the joint ownership has been dissolved.

199 Ark. at 617, 135 S.W.2d at 841. Accord, McGuire vs. Benton State Bank, 232 Ark. 1008, 1012, 342 S.W.2d 77, 79 (1961)."

It is therefore without dispute that under Arkansas law, no property right or interest is defined simply by the establishment of a joint bank account.

Petitioner has argued that because the tax debtor could withdraw the sums from the bank account a right to property exists belonging to him. It should be noted that even if such a "right to property" belongs to Roy, such a right is only in his possession and not in possession of the Respondent. The



levy of the IRS reaches only property or rights in possession of the person upon which the levy is served. See, 26 U.S.C. §6332(a). Since Respondent is not in possession of this right to withdraw, even if it is a "right to property", it holds nothing to be levied upon.

In any event, in Arkansas, the right to make such a withdrawal is not a right which can be exercised by a creditor of one of the depositors.

> "In Hayden vs. Gardner, 238 Ark. 351, 381 S.W.2d 752 (1964), the Supreme Court specifically rejected the view that a creditor of one co-owner is subrogated to that co-owner's power to withdraw the entire account. Instead, a creditor must joint both co-owners as defendants, and the co-owner who is not the debtor may show by parole or otherwise the extent of his or her interest in the account. Only that portion of the account so shown to belong to the nondebtor co-owner may be reached by the other co-owner's creditor on a garnishment. (App. p. 7a)

The Eighth Circuit has therefore accurately concluded that, under Arkansas law, Petitioner has not proved these joint bank accounts to be property or a right to property belonging to the tax debtor. Having not met this threshhold burden, Petitioner cannot prevail.

## CONCLUSION

For these reasons, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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